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No. 87-1743

# In the Supreme Court of the United States

OCTOBER TERM, 1987

OMNI U.S.A., INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals and the Court of International Trade correctly held that petitioner's claim for reliquidation of certain customs entries was time-barred under 19 U.S.C. 1520(c)(1) by virtue of its failure to file a claim within the one-year period provided under that statute.

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 840 F.2d 912. The opinion and judgment of the Court of International Trade (Pet. App. 19a-34a) are reported at 663 F. Supp. 1130.

### JURISDICTION

The judgment of the court of appeals was issued on March 2, 1988. The petition for a writ of certiorari was filed on April 21, 1988. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. On May 6, 1977, the United States Department of the Treasury (Treasury) published a countervailing duty (CVD) order, T.D. 77-128, 11 Cust. B. 242, 42 Fed. Reg. 23146, imposing countervailing duties on certain fasteners imported from Japan into the United States.[1] The order covered fasteners that were classifiable under certain item numbers contained in the Tariff Schedules of the United States (TSUS) and that were entered into the United States or withdrawn from a warehouse for consumption on or after May 6, 1977. On June 4, 1979, as a result of a petition filed on March 23, 1979 (44 Fed. Reg. 17851), Treasury published T.D. 79-158, 13 Cust. B. 366, 44 Fed. Reg. 31972, a final CVD determination and order imposing countervailing duties on industrial fasteners from Japan that were classified under the same TSUS item numbers as those fasteners covered by T.D. 77-128 (as well as certain additional items) and that were entered or withdrawn from a warehouse for consumption on or after June 4, 1979. Except for a brief period in June 1979, entries of Japanese fasteners covered by T.D. 79-158 were liquidated and assessed with countervailing duties pursuant to that order.[2]

On January 2, 1980, the administration of the CVD program was transferred to the Department of

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[1] Pursuant to 19 U.S.C. 1303, a special duty, termed a "countervailing duty," is imposed on imports that have benefited from a bounty or grant prior to import. See *Zenith Radio Corp.* v. *United States*, 437 U.S. 443 (1978).

[2] "Liquidation" is the final computation or ascertainment of the duties owed on a particular entry of merchandise. 19 C.F.R. 159.1.

Commerce (Commerce) by Exec. Order No. 12,188, 3 C.F.R. 131 (1981). On May 13, 1980, Commerce published a notice advising the public of its intention to review annually all CVD orders then in existence. 45 Fed. Reg. 31455. The notice included a list of existing orders to be reviewed. The list included the original Japanese-fastener order, T.D. 77-128, but did not include the subsequent order, T.D. 79-158, which covered the fasteners at issue here.

The May 1980 notice by Commerce did not call for any suspension of liquidation of entries. On August 22, 1980, however, pursuant to instructions from Commerce, the Customs Service advised all field personnel by telex to suspend liquidations of entries of merchandise subject to various cited pending CVD orders. The telex listed the first Japanese-fastener order, T.D. 77-128, but not the second, T.D. 79-158. Consequently, entries subject to T.D. 79-158 continued to be liquidated. That process was ultimately halted on November 26, 1980, by a telex from Customs to its field personnel.

2. Between February 14, 1980, and September 18, 1980, petitioner made 16 entries of industrial fasteners from Japan that were covered by T.D. 79-158, and it deposited the estimated countervailing duties for each entry. Those entries were liquidated between April 7, 1980, and October 23, 1980, and were assessed with countervailing duties at the estimated CVD deposit rate established by T.D. 79-158. Petitioner did not file a protest challenging the assessment of countervailing duties within 90 days after receiving notice of liquidation, as authorized by 19 U.S.C. 1514; nor did it request reliquidation on the ground of clerical error within one year after the

notice of liquidation, as authorized by 19 U.S.C. 1520(c)(1).[3]

On October 29, 1981, Commerce published a notice of "Final results of administrative review" for 1979. 46 Fed. Reg. 53485. That administrative review, which covered fasteners entered in 1979 and subject to T.D. 77-128 and T.D. 79-158, set substantially lower CVD rates for unliquidated merchandise classifiable under the TSUS item numbers that applied to petitioner's 1980 entries. The notice also declared that the net subsidy found for fasteners classifiable under other TSUS item numbers covered by T.D. 77-128 and T.D. 79-158 was de minimis and that, therefore, shipments of merchandise classifiable under those numbers and entered between June 4, 1979, and December 31, 1979, were to be liquidated without any contervailing duties. A subsequent review reached essentially the same result for 1980 entries. 48 Fed. Reg. 4864 (1983).

3. On October 13, 1982, almost two years after liquidation of its last entry on October 23, 1980, petitioner submitted a petition to the Customs Service, requesting, pursuant to 19 U.S.C. 1520(c), reliquidation of its 16 entries of industrial fasteners in 1980. Petitioner argued that there had been a clerical error in the assessment of countervailing duties on those

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[3] Section 1520(c) provides that the Customs Service may reliquidate an entry to correct a "clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer * * *, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction * * *."

entries. Of course, because petitioner's entries were all liquidated before October 23, 1980, the petition was not filed within one year after liquidation, as required by 19 U.S.C. 1520(c)(1).

On August 3, 1983, the Customs Service issued a ruling that stated, inter alia, that liquidations of entries of merchandise covered by T.D. 77-128 and T.D. 79-158 were valid and became final as to both the government and importers 90 days after the date of notice of liquidation, unless protests were timely filed pursuant to 19 U.S.C. 1514 or a request for reliquidation had been timely filed pursuant to 19 U.S.C. 1520(c)(1). On May 21, 1984, petitioner's request for reliquidation was denied as untimely on the basis of the Customs Service ruling. On June 4, 1984, petitioner protested, pursuant to 19 U.S.C. 1514, the denial of its Section 1520(c) petition. The protest was denied, again on the basis of the Customs Service ruling.

4. Petitioner instituted this action in the Court of International Trade (CIT) within 180 days after the denial of its protest, claiming that it was entitled to relief under Section 1520(c)(1) or to equitable relief under 28 U.S.C. 1581(i). Relying on *United States* v. *C.O. Mason, Inc.*, 51 C.C.P.A. 107 (1964), cert. denied, 379 U.S. 999 (1965), and *United States* v. *Cajo Trading, Inc.*, 55 C.C.P.A. 61, 403 F.2d 268 (1968), cert. denied, 393 U.S. 827 (1968), petitioner asserted that the liquidations of its 16 entries were void and that, therefore, those liquidations did not begin the one-year period for requests for reliquidation under Section 1520(c)(1). It also argued that *United States* v. *A.N. Deringer, Inc.*, 66 C.C.P.A. 50, 593 F.2d 1015 (1979), which held that *Cajo* and

*Mason* were no longer controlling, had been incorrectly decided.[4]

Relying on *Deringer*, the trial court rejected petitioner's argument that the liquidations were void and therefore could not have started the running of the one-year period specified in Section 1520(c).[5] Accordingly, the court concluded that it lacked jurisdiction because petitioner's request for relief under Section 1520(c)(1) was untimely. The court also rejected petitioner's claim that the liquidations at issue were ultra vires acts that could be reviewed by the court pursuant to the grant of residual jurisdiction in 28 U.S.C. 1581(i). Observing that Section 1581(i) jurisdiction was available only when the more specific means of obtaining review were unavailable or "manifestly inadequate" (Pet. App. 28a (citation omitted)), the court held that it would not have been futile for petitioner to have asserted its objection by way of a timely protest (*id.* at 29a-30a). In particular, the court rejected petitioner's claim (which was not raised in the pleadings or briefs, but mentioned for the first time at oral argument) that it

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[4] In *Cajo* and *Mason*, the Court of Customs and Patent Appeals (CCPA) applied the "void liquidation" theory to permit the survival of claims that otherwise would have been barred by failure to follow statutory protest and review procedures. Under the "void liquidation" theory, ultra vires liquidations are void and therefore do not trigger statutory procedures and time limits. In *Deringer*, the CCPA held that that theory was no longer tenable, noting the intervening 1970 amendments to 19 U.S.C. 1500(d).

[5] The court observed that 19 U.S.C. 1520(c) allows correction of factual or clerical errors "if Customs is advised of the error within one year of liquidation *or exaction*," noting that petitioner did "not argue that no exaction occurred" but, rather, limited its argument to the "nonexistence" of any liquidation. Pet. App. 25a n.2 (emphasis added).

had not been alerted to look for liquidations at a time when they should not have occurred. The court responded that, as in *Deringer*, it is the importer's burden "to check for posted notices of liquidation and to protest timely" (Pet. App. 30a). Since petitioner "did not make out a case of no valid notice," there was "no legally sufficient element of surprise which rendered the normal administrative avenues unavailable here" (*ibid.*).

5. The United States Court of Appeals for the Federal Circuit affirmed (Pet. App. 1a-18a). The court first held that "Section 1520(c)(1) appears to fit the present case like a glove" because the liquidation of petitioner's 1980 entries by mistake was due to an "' * * * inadvertence not amounting to an error in the construction of a law, adverse to the importer'" (Pet. App. 7a, quoting 19 U.S.C. 1520(c)(1)). Petitioner's claim was plainly out of time under that squarely applicable provision. The court then rejected (Pet. App. 10a-18a) petitioner's reliance on the "void liquidation" theory espoused in *Mason* and *Cajo* and cited by petitioner as a basis for salvaging its untimely protests.

The court of appeals explained that the *Mason/Cajo* theory had been eliminated by statute in 1970 and discredited by its predecessor court in *Deringer* in 1979, so that *Cajo* and *Mason* were not binding (Pet. App. 13a-14a). In any event, the court continued, there is no good reason to disturb the overruling of *Mason* and *Cajo*. Even if the *Deringer* court had misapprehended the purpose of the 1970 statutory change, that factor could "not restore *Cajo* and *Mason* to any position requiring obeisance," because the void liquidation doctrine served only to thwart Congress's aim to identify legal and factual

issues for prompt disposition and to place to rest all issues not so identified (Pet. App. 15a). Not only does Section 1520(c)(1) apply "by its own plain language," the court concluded, but the time limit on correction of errors is as necessary in this case as in others to which it applies (Pet. App. 16a).[6] The court accordingly agreed with the trial court that the Section 1520(c)(1) protest mechanism was adequate and that this case thus presented no occasion to apply equitable doctrines "under the supposed authority of 28 U.S.C. § 1581(i)" (Pet. App. 17a).[7]

## ARGUMENT

The concurrent decisions of the Court of International Trade and of the Federal Circuit—the specialized tribunals Congress has established to resolve customs disputes of the kind presented here—are correct and do not conflict with any holding of this Court. Nor do they conflict with decisions of any other court of appeals, and no such conflict will arise given the exclusive jurisdiction of the CIT and the Federal Circuit in this area. Further review is therefore not warranted.

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[6] The court also suggested (Pet. App. 16a-17a) that, if Section 1520(c)(1) did not apply at all because the initial liquidations were simply void, then even the Customs Service could not invoke the provision (within one year) to correct an error in the "liquidation[s]."

[7] The court of appeals also noted (Pet. App. 12a) that, although petitioner asserted that notices of the liquidation were inadequate, the complaint contains no count based on that claim and the trial court did not mention it. "We think the adequacy of notice is not a separate issue for us to decide, but an added circumstance for the assertion of unjust enrichment" (*ibid.*), over which the court found it lacked jurisdiction.

In challenging the 1980 liquidations, petitioner plainly failed to comply with the conditions set by the statutes specifically designed for such cases. Under 19 U.S.C. 1514(a) and (c)(2), a liquidation like those at issue here is "final and conclusive" unless a protest is filed within 90 days or reliquidation is sought under Section 1520(c).[8] Petitioner did not file a protest to challenge the 1980 liquidations within 90 days. And its request for reliquidation under Section 1520(c) was out of time, because it was not filed within the one-year period allowed by that provision. Accordingly, the government, acting under 19 U.S.C. 1515, properly denied the protest challenging the refusal to reliquidate under Section 1520(c), and the courts below properly rejected petitioner's attempt to contest that denial in a suit brought under the jurisdictional grant in 28 U.S.C. 1581(a).[9]

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[8] Section 1514(a) states, in pertinent part: "Except as provided in * * * section 1520 * * *, decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to * * * (5) the liquidation of reliquidation of an entry * * * and (7) the refusal to reliquidate an entry under section 1520(c) of this title, shall be final and conclusive upon all persons * * * unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced * * *."

Section 1514(c)(2) states, in pertinent part: "A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before—(A) notice of liquidation or reliquidation, or (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made."

[9] 19 U.S.C. 1515 describes the administrative process for review of a protest filed under 19 U.S.C. 1514, including a

The courts also properly rejected petitioner's attempt to invoke the catchall residual grant of jurisdiction in 28 U.S.C. 1581(i). "Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co.* v. *United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), cert. denied, No. 87-676 (Jan. 25, 1988); see also *National Corn Growers Ass'n* v. *Baker*, 840 F.2d 1547 (Fed. Cir. 1988); *United States* v. *Uniroyal, Inc.*, 687 F.2d 467 (C.C.P.A. 1982); *American Air Parcel Forwarding Co.* v. *United States*, 718 F.2d 1546 (Fed. Cir. 1983), cert. denied, 466 U.S. 937 (1984). Otherwise, the residual jurisdiction could be used to circumvent the specific conditions Congress established for review under other subsections of Section 1581—*e.g.*, the time limits set for suits covered by Section 1581(a). In this case, Section 1581(a) jurisdiction was available: petitioner could have requested reliquidation within the one-year period prescribed by Section 1520(c)(1); if its request had been denied, it could have filed a protest pursuant to 19 U.S.C. 1514; and upon denial of the protest under 19 U.S.C. 1515, petitioner could have filed suit in the Court of International Trade under 28 U.S.C. 1581(a). Moreover, because petitioner has not established a lack of effective notice of the liquidations, the protest remedy under Section 1581(a) was

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protest (see 19 U.S.C. 1514(a)(7)) from a refusal to reliquidate under Section 1520(c). In turn, 28 U.S.C. 1581(a) states: "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. 1515]."

not "manifestly inadequate." Jurisdiction under 28 U.S.C. 1581(i) was therefore unavailable.

Petitioner renews its attempt to escape that conclusion by invoking the "void liquidation" theory. Under that theory, the one-year period specified in Section 1520(c) never commenced because the liquidations of petitioner's 16 entries in 1980 were ultra vires and hence void. The courts below correctly rejected this argument as well.

First, the 1979 *Deringer* decision, which was a binding precedent, rejected the theory that an invalid liquidation could be treated as a nullity and thereby not start the running of prescribed time limits for relief. Since that decision, Congress has several times amended the provisions that govern the filing and judicial review of challenges to liquidations (*e.g.*, 19 U.S.C. 1514, 1520; 28 U.S.C. 1581), but it has made no modification to cast doubt on the *Deringer* ruling. See, *e.g.*, Trade and Tariff Act of 1984, Pub. L. No. 98-573, §§ 210(b), 212(b)(7)(B), 612(b)(1), 98 Stat. 2977, 2984, 3034; Customs Courts Act of 1980, Pub. L. No. 96-417, §§ 201, 601(5), 605, 94 Stat. 1728, 1744-1745. In any event, the void liquidation theory is wholly unfounded in statutory language, and it plainly undermines the time limits and other procedural requirements of Sections 1514 and 1520(c). The theory thus is contrary to the important congressional policy of channeling specified challenges into carefully designed review processes and of ensuring finality after specified times in the numerous liquidation decisions made each year.[10] Moreover, the theory offers no coherent

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[10] While petitioner argues at great length (Pet. 16-25) that *Deringer* misread the 1970 Congress's intent in deleting certain words from the statute, neither *Deringer* nor the decision

basis on which to distinguish the errors that must be corrected through the prescribed statutory mechanisms, including failures to follow any of numerous statutes, regulations, and orders, from those which are sufficiently grave to render a liquidation ultra vires or "void." [11] Accordingly, the court of appeals

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in this case rests on that deletion. *Deringer* cited the deletion merely as confirmation of its finding of a "pervasive requirement throughout the statute to channel all non-excepted protests through § 1514 even when those protests go to the legality of a custom official's action" (593 F.2d at 1021). And the court below expressly declined to rely solely on *Deringer* as precedent or on the 1970 legislative change, concluding that the void liquidation theory was contrary to the statutory scheme because it "appears to be an abstraction having no function except to thwart the efforts of Congress to identify issues of fact and law for prompt administrative or judicial disposition, and to put permanently to rest issues not thus promptly identified for disposition" (Pet. App. 15a).

[11] Customs officials are required to liquidate entries in conformity with numerous applicable statutes, regulations, and orders, including those issued by agencies such as the Food and Drug Administration, Environmental Protection Agency, Internal Revenue Service, and Department of Agriculture. See, *e.g.*, 19 C.F.R. Pts. 11, 12. Moreover, in some cases, Customs may be required to suspend the liquidation of certain entries pending further investigation or other action. See, *e.g.*, 19 C.F.R. 159.55. It is not clear why a violation of even a statutory duty to suspend is any different in kind from a violation of any of numerous other constraints on customs officials' actions. *Ambassador Div. of Florsheim Shoe* v. *United States*, 748 F.2d 1560 (Fed. Cir. 1984), and *American Permac, Inc.* v. *United States*, 642 F. Supp. 1187 (Ct. Int'l Trade 1986), on which petitioner relies (Pet. 14-15) to establish the duty in this case, merely upheld the government's reliance on a statute-based suspension of liquidation. Neither involved an effort to enforce any such suspension against the government; neither suggested that the critical time limits on importers' challenges set by Sections 1514 and 1520(c) could

correctly concluded that, at least where, as here, there is no valid claim of lack of notice of a liquidation, there is no justification for judicial recognition of an ill-defined extra-statutory means of avoiding the procedures and time limits established by Congress for challenging liquidations.[12]

Petitioner's suggestion (Pet. App. 12-13) that the decision of the court of appeals is contrary to decisions of this Court and of other courts of appeals is patently meritless. None of the relied-on decisions involves the current customs statutes. None involves a claim that an allegedly "void" action of which the plaintiff had knowledge did not begin the running of a statutory time limit for challenging the action. To

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be ignored; and neither intimates that a liquidation effected prior to the annual review under 19 U.S.C. 1675 of outstanding CVD orders should be characterized as an ultra vires act as opposed to an error that is remediable by a protest under Section 1514 or a request for reliquidation under Section 1520(c).

[12] Petitioner asserts that the decisions of the lower courts in this case have "placed upon importers the duty of checking bulletin notices of liquidation, at the numerous Customs houses where their merchandise is imported, even during the period when there should be no liquidations under law, in the eventuality that the Government has unlawfully liquidated them" (Pet. 28-29). But neither the trial court nor the court of appeals in this case found that notice to petitioner of the liquidations was inadequate (see Pet. App. 12a). Indeed, the practice of posting bulletin notices of liquidation has been in effect for more than 80 years. See *United States* v. *Charles H. Wyman & Co.*, 156 F. 97, 99 (8th Cir. 1907) (the importer is "bound to take notice of the liquidation bulletin sheet posted for inspection by importers"); *Frederick Wholesale Corp.* v. *United States*, 754 F.2d 349 (Fed. Cir. 1985). It would be both novel and unwarranted to allow an end-run around statutory procedures on the ground that petitioner simply failed to recognize a legal error in an adverse action of which it was aware.

the extent those decisions speak of "void" actions by public officials—a characterization that in some settings means nothing more than that the actions are invalid—they do so in contexts far removed from this case.[13]

Finally, the decisions relied on by petitioner (Pet. 12 n.2) that were rendered by courts that are now within the Federal Circuit cannot create a conflict warranting this Court's review. That is especially so with respect to a claim, such as petitioner's, that is based on an extra-statutory doctrine created by such courts. In any event, the relied-on decisions all predate both *Deringer* and the subsequent congressional revisions of the pertinent statutes. And even

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[13] *Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944) (regulation is invalid under Fair Labor Standards Act); *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931) (FTC has no jurisdiction over a product in which there is no competition); *Waite* v. *Macy*, 246 U.S. 606 (1917) (Secretary of Treasury has no jurisdiction to exclude tea imports based on an unlawful purity test); *Norton* v. *Shelby County*, 118 U.S. 425, 441, 449 (1886) (bonds are void that were issued by a county board that had no lawful existence; legality of body was "from the outset * * * resisted by legal proceedings"); *Director, OWCP* v. *National Mines Corp.*, 554 F.2d 1267 (4th Cir. 1977) (administrative hearings under black-lung-benefits program, if conducted by unauthorized officers, would be invalid, but officers appointed by Secretary of Labor were in fact authorized); *United States* v. *Soto-Soto*, 598 F.2d 545 (9th Cir. 1979) (search was illegal because agent who conducted the search was not authorized by law to do so).

*Marriott* v. *Brune*, 50 U.S. (9 How.) 619, 636 (1850), also cited by petitioner (Pet. 12-13), actually supports the insistence on finality in this case. The Court there held that a protest made after initial payment of duties was timely if, but only if, the "final adjustment" had not taken place and the payment had not been transferred by the collector to the Treasury.

*Cajo* and *Mason*, on which petitioner chiefly relies, did not establish any broad principle: as *Deringer* explained, "*Cajo* and *Mason* were the result of extraordinary factual and legal situations requiring unique remedies." 593 F.2d at 1020.[14]

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[14] *Cajo* involved a liquidation under a presidential proclamation later declared unlawful, and *Mason* involved a liquidation under a Puerto Rico statute later declared unconstitutional. *Balfour, Guthrie & Co.* v. *United States*, 67 Cust. Ct. 173 (1971), on which petitioner also apparently relies, followed *Cajo* and *Mason* where a liquidation was effected under a presidential proclamation later declared invalid.

Four of the remaining decisions cited by petitioner simply involved holdings that certain presidential proclamations, statutes, or findings were invalid, and hence "void" in a sense having nothing to do with any questions regarding the timeliness of challenges. *United States* v. *Schmidt Pritchard & Co.*, 47 C.C.P.A. 152, cert. denied, 364 U.S. 919 (1960) (presidential proclamation); *United States* v. *Prym*, 17 C.C.P.A. 180 (1929) (underlying finding); *Falcon Sales Co.* v. *United States*, 47 Cust. Ct. 129 (1961), appeal dismissed, 49 C.C.P.A. 139 (1962) (presidential proclamation); *Pan American Standard Brands Co.* v. *United States*, 43 Cust. Ct. 122 (1959) (Puerto Rico law). The other decisions cited by petitioner are also all readily distinguishable. *Stubbs* v. *United States*, 7 Ct. Cust. App. 399 (1917) (a liquidation while the appraisement is on appeal is void, and hence the importer, which participated in the appellate proceeding, could not assert the finality of such a premature liquidation as a ground for invalidating a post-appeal, correct liquidation); *United States* v. *Astra Bentwood Furniture Co.*, 28 C.C.P.A. 205 (1940) (the liquidation notice was so defective that the importer had no actual notice); *Nozaki Bros.* v. *United States*, 41 Cust. Ct. 245 (1958) (although the court based its ruling on the voidness of a liquidation effected contrary to a binding judgment, in fact the importer timely sought relief under Section 1520(c)).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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